

UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

SOUTHERN DIVISION

UNITED STATES OF AMERICA,)	CR. 10-40004-01-KES
)	
Plaintiff,)	
)	
vs.)	ORDER
)	
VIENGXAY CHANTHARATH,)	
a/k/a "OG,")	
)	
Defendant.)	

Viengxay Chantharath moves (Docket 828) under Rule 60(b) for relief from the criminal judgment of conviction that has been affirmed by the Eighth Circuit Court of Appeals. *United States v. Chantharath*, 705 F.3d 295 (8th Cir. 2013). In the alternative, Chantharath moves to have his motion considered under § 2255 (Docket 830).

Fed. R. Civil. P. 60(b) is a rule of civil procedure, which applies to civil proceedings. See Fed. R. Civ. P. 1, 81(a)(4) (stating that the Federal Rules of Civil Procedure apply to civil actions, which are distinct from § 2255 cases). “Rule 60(b) may not be used to relieve a party from operation of a judgment of conviction or sentence in a criminal case.” *United States v. Hunt*, 2008 WL 4186258 at *1 (E.D. Mo. Sept. 5, 2008); *see also United States v. Mosavi*, 138 F.3d 1365, 1366 (11th Cir. 1998) (“Rule 60(b) simply does not provide for relief from judgment in a criminal case”); *United States v. Eggleston*, 24 F. App’x

656, 656 (8th Cir. 2002) (unpublished) (per curiam) (“[W]e agree with the district court that Rule 60(b) applies only to civil cases [and not to § 2255 relief].”).

Because Chantharath cannot use Rule 60(b) to obtain relief in his criminal proceeding, the court will construe his request for relief as a motion under § 2255. The clerk is directed to open a new matter under § 2255 and forward the proper draft § 2255 pleadings to Chantharath for completion. It is

ORDERED that defendant’s motion for relief from final judgment (Docket 828) is denied.

IT IS FURTHER ORDERED that defendant’s motion to construe motion under Rule 60(b) to be a motion under § 2255 (Docket 830) is granted. The clerk is directed to open a new matter under § 2255 and forward the proper draft § 2255 pleadings to Chantharath for completion.

Dated October 17, 2013.

BY THE COURT:

/s/ Karen E. Schreier

KAREN E. SCHREIER
UNITED STATES DISTRICT JUDGE